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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-458

ROBERT DAVID WARD,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS B. BURCH,
Attorney General
of Maryland,
CLARENCE W. SHARP,
Assistant Attorney General
Chief, Criminal Division,
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Respondent.

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PRELIMINARY COMMENTS

This Brief in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

OPINIONS BELOW

On November 21, 1975, the Petitioner Robert David Ward was arrested pursuant to an arrest warrant and charged in the District Court of Maryland with operating an aircraft in a reckless and unsafe manner, under Article 1A, Sections 10-1002, 10-1003 of the Annotated Code of Maryland. On July 20, 1976, the Petitioner appeared for trial before the Honorable

William Bowie and the case was submitted to him on a stipulation of facts. On that same date the court found the Petitioner guilty of operating an aircraft in a reckless and unsafe manner and was sentenced to the jurisdiction of the County Detention Center for a period of ninety days and was required to pay a fine of five hundred dollars. However, the sentence of incarceration was suspended upon the special condition that he not operate an aircraft within the State of Maryland for a period of one year from September 17, 1976. Thereafter the Court of Appeals of Maryland granted the Writ of Certiorari filed by the Petitioner on October 4, 1976 requiring the parties to file briefs and present oral argument. On June 24, 1977 the Court of Appeals of Maryland filed a reported opinion in which it affirmed the judgment and sentence below as well as the order of the lower court denying the motion to dismiss the indictment. *Ward v. State,* 280 Md. 485, 374 A.2d 1118 (1977). From that decision of the Court of Appeals of Maryland the Petitioner has applied to this Honorable Court for a Writ of Certiorari to review the decision of the Court of Appeals of Maryland.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Honorable Court pursuant to the provisions of Article 2, Section 2 of the Constitution of the United States. However, since these provisions are concerned with the powers of the President of the United States, the Respondent submits that Petitioner has failed to assert a proper basis upon which this Honorable Court could assume jurisdiction in this case. See Supreme Court Rule 23b (iii).[1]

[1] The jurisdiction of this Court may arguably be invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether the Federal Aviation Act of 1958 and the regulations promulgated thereunder which provide civil penalties for the reckless operation of an aircraft preempts the Maryland Aviation Statute which provides criminal penalties for such conduct.

STATUTES INVOLVED

Petitioner contends that Article 1, Section 8, Clause 3 and Article 6, Clause 2 of the Constitution of the United States and the Federal Aviation Act of 1958, Title 49, U.S. Code Annotated, Section 1301, *et. seq.*, and the Maryland Aviation Statute, Article 1A, Section 10-1002 and 10-1003 are involved.

STATEMENT OF THE CASE

The Respondent would incorporate by reference herein those facts as set forth under "Opinions Below" *supra.* In addition, Respondent adopts and incorporates by reference herein the facts as set forth by the Court of Appeals of Maryland in its Opinion (See pp. 6a-8a of the Appendix to the Petition in this case.)

ARGUMENT

I.

THE FEDERAL AVIATION ACT OF 1958 AND THE REGULATIONS PROMULGATED THEREUNDER WHICH PROVIDE CIVIL PENALTIES FOR THE RECKLESS OPERATION OF AN AIRCRAFT DO NOT PREEMPT THE MARYLAND AVIATION STATUTE WHICH PROVIDES CRIMINAL PENALTIES FOR SUCH CONDUCT.

A. The Issue Presented Was Given Full Consideration By The Court Of Appeals Of Maryland And Was Correctly Decided.

In the case at bar the facts established that the Petitioner operated his aircraft in a reckless and unsafe manner in the air space over the State of Maryland.

The Petitioner was charged and convicted under the Maryland statute which proscribes such conduct and provides criminal penalties therefor. Article 1A, Section 10-1002 and 10-1003 of the Maryland Code. Among the penalties imposed upon Petitioner was that he not operate an aircraft in or over Maryland for a period of one year. Concurrent to the proceedings in the State Court, the Federal Aviation Administration, pursuant to the regulations of the Federal Aviation Act, revoked the Petitioner's pilot license but subsequently reissued it to him.

The crux of the Petitioner's argument is that Maryland has no right to prosecute Petitioner criminally for reckless aircraft operation because civil penalties are provided for the same conduct under the Federal Aviation Act. The legal basis for this contention is that the Federal statute preempts the State law. It was upon these narrow grounds and the specific Federal and State statutory provisions that the Maryland court decided this case under the preemption doctrine. In an effort to have this Court accept review the Petitioner would have this Honorable Court believe that "If the present decision is left standing it will be open season for every State to share in the control of aircraft, destroying completely the uniformity of control which now exists and which is imperative due to the nature of flight." (Pet. 5). Respondent submits that such an assertion is completely unfounded and such an interpretation of the opinion below was neither expressed nor implied by the Maryland Court.

In any event it was within this context that the preemption doctrine was analyzed and applied in the instant case. The Respondent submits that the Court comprehensively and accurately delineated the principles of express and implied preemption under recent and not so recent decisions of the Court; *Jones v. Rath Packing Co.*, ___ U.S. ___, 97 S. Ct. 1305 (1977); *City of Philadelphia v. New Jersey*, ___ U.S. ___, 97 S. Ct. 987 (1977); *Knapp v. Schweitzer*, 357 U.S. 371, 78 S. Ct. 1302 (1958); *Kelly v. State of Washington*, 302 U.S. 1, 58 S. Ct. 87 (1937); *DeCanas v. Bica*, 424 U.S. 351, 96 S. Ct. 933 (1976) and others.

The Petitioner contends now, as he did below, that Congress expressly preempted the field of air commerce when it said "the United States of America is declared to possess and exercise complete sovereignty in the air space of the United States" 49 U.S.C. Annotated, Section 1508A. However, an identical contention was rejected by this Honorable Court in *Braniff Airways v. Nebraska State Board of Equalization and Assessments, et al.*, 347 U.S. 590, 74 S. Ct. 757 (1954)[2] which was concerned with the sovereignty clause of both the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938 (which contained a sovereignty clause identical to that of Section 1508A.

Moreover, congressional legislative history lacks an expression of preemptive intent but contains a clear statement of a contrary intent. House Report 958 discussing the Federal Aviation Act makes it quite clear that the Act does not preempt state criminal jurisdiction over the air space. 1961 U.S. Congressional and Administrative News 2563-2566. (See Petition Appendix pp. 21a-22a).

In addition, there is no implied preemption of the Federal statute simply because of the comprehensive scheme of the Federal legislation. The subject of air navigation by its very nature requires intricate and complex responses from the Congress but without necessarily intending its enactment as the exclusive means of meeting the problem. Given the complexity of the matter addressed by Congress in the Federal Aviation Act of 1958, a detailed statutory scheme was

[2] The Court of Appeals did not cite or discuss *Braniff, supra.*

both likely and appropriate completely apart from any questions of preemptive intent. Therefore, Respondent submits that Congress did not impliedly intend to preempt the field of aviation by the mere enactment of this detailed statute. *Cf. Decanas v. Bica, supra* and *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 93 S. Ct. 2507 (1973).

Having thus established the general power of the State to regulate air commerce, the remaining issue is whether the State statute conflicts with the Federal Act. It is undisputed that the conduct proscribed under both statutes (reckless operation of an aircraft) is identical. Petitioner claims however, that because the penalty provision of the Maryland Statute ordered him not to fly an airplane in Maryland for a year at a time when he maintained a federal pilot's license in good standing, the two statutes conflict. In response the Respondent would initially emphasize that there is no inherent conflict in the sanctions imposed under the Federal Regulations and the State statute. It was only by dint of the fact that the FAA, following revocation, reinstated the Petitioner's Federal Pilot's license that he was able to argue this conflict. Had his license not been reinstated his conflict argument in the Court below and now on appeal would have fallen of its own weight. Additionally, the Court of Appeals recognized: (Petition Appendix pp. 23a-24a)

> "it would be incongruous indeed, in light of the Federal purposes and objectives, if Maryland were to be constitutionally precluded from the criminal prosecution of a person for such conduct because a federal regulation authorized civil penalties.
>
> * * * * * *
>
> In any event, we do not see how prohibiting, for a limited time, the operation of an aircraft within Maryland by a person who has been found guilty in a court of law of operating an aircraft in a careless or reckless manner so as to endanger the life or property of another could be said to stand as an obstacle to the Congressional purposes and objectives."

Finally, this Honorable Court has recognized "that the same act might, as to its character and tendencies and the consequences it involved, constitute an offence against both the state and Federal Government and might draw to its commission the penalties by either as appropriate to its character in reference to each." *California v. Zook,* 69 S. Ct. 841 (1949); *Stathes v. State,* 29 Md. App. 474 (1975), *cert. den.* ____ Md. ____ (Petition Docket 2, September Term, 1976), May 5, 1976, appeal dismissed for want of a substantial Federal question 97 S. Ct. 36 (1976).

B. The Question Lacks Sufficient Importance To Warrant Review By This Court.

In the Court below the parties were unable to discover precedents controlling on the facts and issues presented in this case. The Court of Appeals made specific mention of this fact when it said:

> "We have not been referred to a decision of another jurisdiction state or federal, which addresses the matter of preemption of a statute prohibiting such operation of an aircraft. There being no decision precisely on point to bind or persuade us, we shall follow the path laid down by the decisions of the Supreme Court of the United States concerning the doctrine of preemption to determine whether the Maryland statute is enforceable."

In addition, while there are many states that have enacted reckless operation of aircraft statutes, the Petitioner has not cited any statute containing penalty provisions identical or similar to the Maryland statute which, according to him, created in Maryland the conflict between its statute and the Federal Aviation Act. In view of these facts, the urgency, immediacy and

importance of the issue evaporates under closer scrutiny. The Respondent further submits that this Court should not exercise its discretion to review this case since the decision of the Maryland Court is based upon the operation of a Maryland Statute within the confines of the State of Maryland. See *DelVecchio v. Bowers*, 296 U.S. 280 (1935).

The Respondent also notes that while Petitioner does not allege that there are *conflicting decisions* decided by the lower Federal or State courts, he does cite four cases in support of his position. However, those cases are simply inapposite to the facts and issues presented in this case. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S. Ct. 1854 (1973) found only that the Noise Control Act Amendment to Federal Aviation Act preempted local control and regulation of airplane noise. The present case is not concerned with noise control but rather reckless flying.

In *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369 (2nd Cir. 1968), cited by the Appellant, the Court again considered a noise ordinance in light of the Federal Aviation Statute of 1958. American Airlines argued that (1) the ordinance was an undue burden on interstate commerce, (2) was preempted by the Federal Statute and (3) the ordinance was in direct conflict with the Federal regulation. The Court declined to consider the preemption and burden contentions but rather based its decision on a finding of a conflict between the ordinance and federal regulations which it held to be in direct conflict with one another not because the regulations and ordinance imposed different standards for noise, but because the present state of development of noise suppression techniques would mean that compliance with the noise ordinance would require alterations in the flight patterns and procedures established by Federal regulations. This was also the case in *Burbank, supra.* However, in the present case

the situation is again entirely different in that there is no evidence of facial impossibility of compliance with both the State and Federal requirements.

Likewise, *Allegany Airlines v. Village of Cedarhurst*, 238 F.2d 812 (2nd Cir. 1956) cited by Appellant held invalid an ordinance prohibiting flights over the village at altitudes below 1,000 feet. Despite the broad preemption language contained therein the Court was there dealing with an ordinance which "plainly conflicts with the Federal statutes and regulations." (id. at p. 814). Moreover, the action and the words of the trial court did "not affect the rights of property owners"; their claims based on nuisance and trespass had been withdrawn.

Finally, *City of Newark, New Jersey v. Eastern Airlines*, 159 F. Supp. 750 (D.C. N.J. 1958), cited by Appellant did not hold that the operation of state law, in that case the law of New Jersey, was precluded. The first count of that action under a nuisance theory sought an injunction against operations over certain areas at altitudes below 1200 feet. The District Court viewed this as an amendment to the Civil Air Regulations and denied relief applying the doctrine of primary jurisdiction. The second count sought an injunction and damages on a trespass theory. The court stated (p. 760) that "the principals do not foreclose the right of landowners to maintain an action for trespass to realty in a proper case." However, relief was denied because plaintiffs had failed to present sufficient evidence to support their claims. It is to be noted that it had been stipulated that all operations were in accord with Federal law.

C. The Decision Of The Court Of Appeals Of Maryland Was Fundamentally Fair And In Accord With Sound Reasons Of Public Policy.

The primary purpose of state control over air traffic is to secure the public safety and general health of the

people in which the state acts in conjunction with the Federal government pursuant to the state aviation statutes in furtherance of these goals. The state law is in essence nothing more nor less than an enforcement measure in aid of Federal legislation to regulate aircraft within the boundaries of the state. It cannot be said that a state is precluded from enacting legislation which has the effect of enforcing Federal regulations which apply peculiarly within state limits. The primary purpose of any legislation to control aircraft is to ensure the public safety and general health of all the people. The state law is directed to the same objective. Enforcement machinery of the Federal government is often inadequate to police every airport in every State of the union. Therefore, proper enforcement by state authorities is necessary. Cf. *People v. Newhauser,* 92 N.Y.2d 291 (1949); *People v. Altman,* 304 N.Y.2d 534 (1969).

The Petitioner fails to take into account these public policy considerations and urges that the Federal government should be the only agency to enforce Federal laws regulating the operation of aircraft. However, such a position could lead to absurd results as illustrated by a recent aircraft accident which occurred at Memorial Stadium, Baltimore, Maryland within the last year where a small airplane crashed into the upper stands of the stadium. Fortunately, tragedy was averted and no serious injuries occurred because spectators at a football game that afternoon had moments before vacated the stadium. To suggest that only civil penalties could be imposed under Federal regulations for that conduct thus precluding criminal penalties under State law is indeed ludicrous.

While the question was dealt with in a different context, this Court has long held that every citizen in the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns and

may be liable to punishment for infractions of the laws of either. The same act may be an offense or transgression against the laws of both and either or both may punish such offender. *Bartkus v. Illinois,* 359 U.S. 676 (1959). Analogously, although there exists a Federal criminal bank robbery statute, that fact does not mean that a State cannot prosecute an individual for bank robberies under its own laws. Likewise, Respondent submits that, simply because there is a Federal law proscribing the reckless operation of an aircraft, that fact does not mean that the State cannot prohibit and punish the same conduct under its law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari to the Court of Appeals of Maryland should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland,
CLARENCE W. SHARP,
Assistant Attorney General
Chief, Criminal Division,
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Respondent.